

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1105

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To Be Argued By:
ANDREW B. BOWMAN

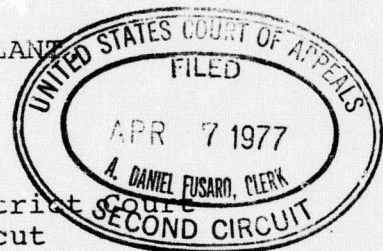
DOCKET NO. 77-1105

UNITED STATES OF AMERICA,
APPELLEE,

-VS-

DAVID DANIEL EVANS,

APPELLANT



On Appeal From The United States District Court
For The District of Connecticut
=====

BRIEF FOR APPELLANT DAVID DANIEL EVANS
=====

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STATUTES INVOLVED

18 U.S.C. §401:

§401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. §402:

§402. Contempts [also] constituting crimes

..... [A]ll other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

28 U.S.C. §1826:

§1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

FEDERAL RULES OF CRIMINAL PROCEDURE

Federal Rule of Criminal Procedure 42(b):

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF ISSUES

1. Whether the district court violated either Shillitani v. United States, 384 U.S. 364 (1966), or the Fifth Amendment equal protection guarantee in punishing the appellant with a six month sentence for criminal contempt, where another person in the appellant's position but financially able to post bond would have been cited for civil contempt and in any event would not have served more than 39 days for the same contempt.

2. Whether, in the absence of any rule or other authority authorizing a district judge to compel an indicted defendant to submit to pretrial, "nontestimonial" investigation by the F.B.I., the appellant may be punished for criminal contempt for respectfully refusing to comply with such an order.

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

APPELLEE,

-vs-

DAVID DANIEL EVANS,

APPELLANT.

BRIEF FOR APPELLANT DAVID DANIEL EVANS

STATEMENT

This is a direct appeal from a judgment of conviction on a charge of criminal contempt entered on February 14, 1977, by the Honorable Jon O. Newman, United States District Judge. David Evans received a six-month prison sentence from Judge Newman, which is to run consecutively to a two-year sentence imposed on February 14, 1977, for a demand note bank robbery to which the appellant had previously pleaded guilty on January 11, 1977.

On November 16, 1976, a grand jury at Hartford returned a six count indictment charging David Evans with the robbery by demand note of three banks in New Haven, Connecticut, between October 14 and November 8, 1976. On November 23 David Evans was arraigned, counsel was appointed, a plea of not guilty entered; a trial date of January 3, 1977 was set, and after oral argument, Judge Newman set a \$20,000 full surety bond. Evans was completely without funds and was therefore incarcerated in lieu of bond. (Tr. 2-7.) Prior to arraignment, the United States Marshal obtained prints from Evans' fingertips, and Evans signed the fingerprint card.

After arraignment, the government moved for an order requiring Evans to submit to "major case printing" by the F.B.I., and to provide certain handwriting exemplars. The government informed the court that it wanted prints not only of Evans' fingertips but also of his palms, fingers, and sides of his hands. (App. 21.) Over Evans' objection, Judge Newman ordered Evans to submit to major case printing and to provide certain handwriting. (App. 25-27.) Evans subsequently refused to comply, and the matter was continued to permit defense counsel to submit a written memorandum in opposition to the government's motion. On November 24, the government filed its Notice of Readiness for Trial. (App. 6.)

On November 29, the government renewed in writing its motion to compel major case printing, (App. 7-8) and, over

written objection by Evans, (App. 9-13) Judge Newman executed an order compelling appellant to provide the major case prints and certain handwriting, to wit:

This is a stick up give me all yours money.

This is a stick up give me the money.

(App. 14.) On November 30 the government sought an order from the court to compel additional handwriting but was refused. (Tr. 17-22.) Evans subsequently provided the government with the handwriting set forth in Judge Newman's order of November 29, 1976.

On December 3 the government brought a motion for an order to show cause why David Evans should not be held in criminal contempt for his failure to provide major case prints. (App. 15-17.) A hearing without a jury was held. Special Agent Quinn testified that he had not checked with either the Connecticut State Police, Somers Prison, or any other law enforcement agency in order to ascertain whether Evans' palm prints were on file within the state of Connecticut. (App. 52-53.) Further, no request had been made of the investigating grand jury to issue a subpoena for the palm prints of Evans.¹ (App. 55.) After Quinn's testimony, the government rested and Evans argued that an adjudication of

1. One of Evans' fingerprints had been previously identified on the demand note used in the third bank robbery, which took place on November 8, 1976. Evans was arrested by local police on November 10 for the robberies.

criminal contempt denied him, an indigent, the equal protection of the laws. Nevertheless, Judge Newman held David Evans in criminal contempt. (App. 61.)

On January 3, 1977, a jury was selected in the bank robbery case. On January 10, evidentiary hearings on motions to suppress were held, and on January 11 David Evans changed his plea as to counts four and six of the indictment. On February 14, 1977, after hearing appellant state he had refused to submit to palm printing because he had birthmarks on his palm (Tr. 54), Judge Newman imposed a six-month prison sentence for criminal contempt, the maximum he was authorized to impose, which sentence was to run consecutively to a two-year prison sentence imposed upon Evans' plea of guilty to count four, bank larceny.² (App. 19.) On February 17, 1977, a notice of appeal from the judgment of criminal contempt was filed. (App. 20A.) David Evans is presently serving his two-year sentence on the charges of bank larceny, from which no appeal was filed.

2. Judge Newman imposed a ten-year suspended sentence on count six with five years probation to run consecutively to the sentence imposed on count four and to the contempt sentence. (App. 64.)

ARGUMENT

I. THE JUDGMENT OF CONVICTION ON
THE CHARGE OF CRIMINAL CONTEMPT
AND THE SENTENCE OF SIX MONTHS
IMPRISONMENT VIOLATED APPELLANT'S
FIFTH AMENDMENT RIGHT TO EQUAL
PROTECTION OF THE LAW AND THE
RULE OF SHILLITANI v. UNITED
STATES.

A. The Judgment of Conviction for Criminal
Contempt Violated Appellant's Fifth Amend-
ment Right to Equal Protection of the Law
and the Rule of Shillitani v. United States.

When the government sought its order to show cause why David Evans should not be held in criminal contempt for failure to submit to major case printing, Evans was incarcerated in lieu of \$20,000 full surety bond which he could not post because he was indigent. It was in the context of Evans' incarceration that the district court was asked by the government to inflict nonconditional punishment and the stigma of a criminal conviction rather than to use its civil contempt power to coerce Evans' compliance with the Court's order. See 28 U.S.C. §1826. For several reasons, the adjudication of criminal contempt on this basis was error.

In Shillitani v. United States, 384 U.S. 364, 371 (1966), the Supreme Court reiterated the long standing doctrine set forth in Anderson v. Dunn, 6 Wheat. (19 U.S.) 204, 231 (1821), and In re Michael, 326 U.S. 224, 227 (1945), "that a court must exercise the least possible power adequate to the end proposed."

This doctrine further requires that the trial judge first consider the

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and the conclusion of the trial would be time which would not count toward the service of a sentence upon conviction of the bank robbery charges in the indictment. It would be additional or so-called "dead" time. In re Grand Jury Investigation, Hartzell, 542 F.2d 166 (3rd Cir.), rehearing and rehearing in banc denied (1976); Martin v. United States, 517 F.2d 906 (8th Cir. 1975); Williamson v. Saxbe, 513 F.2d 1309 (6th Cir. 1975) (per curiam); United States v. Liddy, 510 F.2d 669 (CA DC 1974) (in banc), cert. denied, 420 U.S. 962 (1975). Evans could not purge himself of the criminal contempt order which was unconditional. (App. 62.) If the contempt order were civil, Evans's preconviction jail credit would have begun accruing again upon his compliance with the court's order or when he changed his plea, thereby fulfilling the coercive purpose of the contempt. See Shillitani, supra. Therefore, the appellant would have had it within his power to shorten his incarceration by complying. Thus, civil contempt would have been effective.

Finally, if civil contempt were adjudged by the district court, appellant would have had the opportunity to purge himself at any time between December 3, 1976, and January 11, 1977, and the government would have received the prints. Therefore, the least severe punishment would have resulted in a benefit to the government at small cost to appellant.

The trial judge's decision to hold David Evans in criminal rather than civil contempt also violated Evans' right to equal

protection of the law under the Fifth Amendment. In United States v. Gaines, 449 F.2d 143, 144 (2d Cir. 1971), this Court stated:

The Supreme Court's decisions in Tate v. Short, 401 U.S. 395 (1971), and Williams v. Illinois, 399 U.S. 235 (1970), indicate that a man should not be kept imprisoned solely because of his lack of wealth.

Gaines, who faced both state and federal charges, was unable to enter federal custody solely because he lacked sufficient funds to post bond in the state court which held him in custody. The issue was whether Gaines would be given federal credit for time spent in state custody after federal bail was set. The Second Circuit held that Gaines was entitled to federal credit since a richer man would have been able to post the state bond thereby placing himself in actual federal custody. The Gaines decision stemmed from the Supreme Court's holding in Williams v. Illinois, supra, in which the Chief Justice held that there is an impermissible discrimination and a violation of the Equal Protection Clause when imprisonment which exceeds the maximum period fixed by statute results directly from an involuntary nonpayment of a fine or court costs. Like Williams, Gaines, and Tate, David Evans was penalized by his economic status when he was adjudged in criminal rather than civil contempt because he was already incarcerated. He was incarcerated because he was unable to post a \$20,000 full surety bond. He was penniless, and he was therefore punished where a wealthier man

would have been coerced. A wealthier man would have had the opportunity to purge himself of a civil contempt order, but David Evans, because of his poverty, was not given that opportunity. His criminal contempt order was unconditional.

While the trial judge observed that a \$20,000 bond might be inadequate to assure the presence of a wealthier man, who might then succumb to incarceration for failure to post a higher bond, that argument pales when we take notice of the financial fact of life, that people who have money are able to obtain money either from others or from financial institutions. The district court's reasoning also cannot be squared with this Court's ratio decidendi in Gaines.

The judgment of criminal conviction violated Shillitani v. United States and appellant's Fifth Amendment right to equal protection of the law. The conviction should be reversed.

B. The Imposition of a Six Month Term of Incarceration Violated the Equal Protection Clause and the Rule of Shillitani v. United States.

Even if the adjudication of criminal contempt did not violate the Equal Protection Clause and the rule in Shillitani v. United States, supra, the six month unconditional sentence did. Under a civil contempt order, Evans would have lost no more than the 39 days from December 3, 1976, to January 11, 1977, when he changed his plea and the trial ended. Under the present sentence, Evans has lost 180 days solely because

of his inability to meet the terms of his bond. Appellant respectfully submits that the Supreme Court's decisions in Williams v. Illinois, supra, and Tate v. Short, supra, and this circuit's decision in United States v. Gaines, supra, require that imposition of sentence for criminal contempt in this case not exceed 39 days or else be violative of the equal protection aspect of the Fifth Amendment's due process clause. Cf. Buckley v. Valeo, 424 U.S. 1, 93 (1976). Evans' lack of wealth has resulted in his having to serve a longer sentence than a richer man would have had to serve, an impermissible discrimination.

Moreover, Judge Newman imposed the maximum sentence the Constitution permits in a nonjury case. Cheff v. Schnackenberg, 384 U.S. 373 (1966). David Evans' act of disobedience consisted solely in respectfully refusing, for both personal and legal reasons, to do what had been ordered, not in doing what had been prohibited. It thus cannot be said that imposition of the maximum sentence was an "exercise [of] the least power adequate to the end proposed." Shillitani, supra, 384 U.S. at 371. To impose a six month sentence for the conduct involved in this case was error calling, at the least, for vacation and reduction of the sentence.

The sentence of six months violated the appellant's right to equal protection and the rule of Shillitani v. United States and should be vacated.

II. THE REFUSAL OF AN INDICTED DEFENDANT
TO SUBMIT TO COURT-ORDERED, PRETRIAL,
"NONTESTIMONIAL" INVESTIGATION BY THE
FBI IS NOT PUNISHABLE AS CRIMINAL
CONTEMPT.

After indictment and arraignment, and after the government filed a formal Notice of Readiness for trial, the prosecutor sought and obtained from the court an order compelling the defendant to provide to the FBI agent in charge of the case a set of "major case prints," that is, inked impressions of his palms and the sides of his hands, as well as full fingerprints.³ The defendant refused.⁴ After a bench trial, the court cited him for criminal contempt and later imposed a six month consecutive sentence, the maximum allowed by law in a nonjury trial.

Disclosure after indictment and before trial is governed by the terms of Rule 16 of the Federal Rules of Criminal Procedure. United States v. Nobles, 422 U.S. 225, 234-36 (1975). Neither this rule nor any other statutory authority empowers a federal court to enter an order compelling a defendant to cooperate in his own prosecution in the way attempted here.⁵

3. At the time of his arraignment, he submitted to complete, routine, identification fingerprinting by the United States Marshal.

4. The court also ordered the defendant to provide a sample of his handprinting. With this order he complied.

5. If a case goes to trial, the issue of what a defendant can be compelled to do no longer falls under Rule 16; it becomes a matter of constitutional evidence law, and the answers at that stage may change. Nobles, supra, 422 U.S. at 233 n.7.

A new rule allowing the court to enter an order such as that which the appellant refused was proposed in 1971. See "Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure," 52 F.R.D. 409, 462-72 (1971) (proposed Rule 41.1). The proposal was never adopted by the Supreme Court or approved by Congress. Cf. ABA Standards Relating to Discovery and Procedure Before Trial §3.1 (App. Draft 1971). While the issue involved here is thus potentially within the scope of the rule, Congress has declined to allow it.

The government now seeks to have this Court affirm the view that any imposition on a defendant which is not expressly prohibited by law must be permitted. This attitude is inconsistent with the Due Process Clause, which is concerned with "the balance of forces between the accused and his accuser." Wardius v. Oregon, 412 U.S. 470, 474 (1973). The legislative history of Rule 16, from its beginnings in 1966 to its considered amendment (along with the enactment of Rules 12.1 and 12.2) in 1975, displays the care and precision involved in working out a balanced and fair system of pretrial disclosure obligations for the government and the defendant. Thus, it is fundamentally erroneous to assume that the rule contemplates anything other than what it expressly provides, Wardius, supra, or that our system should tolerate compelled disclosures not covered by rule at all.

Gilbert v. California, 388 U.S. 263, 265-67 (1967), and United States v. Wade, 388 U.S. 218 (1967), do not require a contrary result. Wade held there was no Self-Incrimination privilege against being compelled to stand in a line-up after indictment and in the presence of counsel. Gilbert applied the same reasoning to the uncounselled, post-arrest, prearraignment taking of a handwriting exemplar. At the time of the events giving rise to the Wade decision, pretrial discovery was not regulated by rule, and the Court thus did not confront the argument raised here. Nor has this argument been considered in any of the cases relied on by the government below, which simply rejected claims of privilege which the appellant here does not press. United States v. Lincoln, 494 F.2d 833, 838-39 (9th Cir. 1974); United States v. Rogers, 475 F.2d 821, 825-26 (7th Cir. 1973); United States v. Tucker, 473 F.2d 1290, 1294 (6th Cir. 1973); United States v. Nix, 465 F.2d 90, 92-94 (5th Cir.), cert. denied, 409 U.S. 1013 (1972). Likewise, the issues in United States v. Mara, 410 U.S. 19 (1973), United States v. Dionisio, 410 U.S. 1 (1973), and United States v. Doe (Schwartz), 457 F.2d 895 (2d Cir. 1972) were quite different. There, the government's authority to seek evidence by use of a grand jury subpoena was clear. In Schwartz, this Court relied in part on the dual, half protective function of the grand jury. Id. at 899. That reasoning has no application to this case, where the proceedings had moved fully into the accusatorial state. No subpoena can

issue to compel a defendant to supply evidence, whether or not testimonial, between indictment and trial. What the government sought was simply unauthorized by law, and the district court erred in ordering the defendant to comply. Accordingly, the conviction for criminal contempt should be reversed.⁶

6. This case falls within the exception to the general rule barring challenges to the correctness of court orders after a conviction for contempt. The exception covers cases of refusal to supply evidence after the overruling of an assertion of a right to refuse. Maness v. Meyers, 419 U.S. 449, 458-63 (1975).

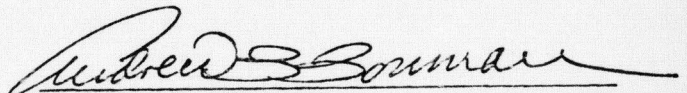
CONCLUSION

The district court lacked any authority to issue the post-indictment, pretrial order which the appellant refused to obey.

The district court's adjudication of criminal contempt also failed to comply with the rule of Shillitani v. United States and violated appellant's Fifth Amendment right to equal protection of the law. The judgment of conviction should be reversed.

Alternatively, if the adjudication of criminal contempt does not violate the equal protection or the Shillitani rule, the six-month sentence does, and, therefore, the sentence should be vacated and remanded to the district court for resentencing to a term not to exceed 39 days.

Respectfully submitted,



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Dated: April 6, 1977

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CERTIFICATION

I hereby certify that two copies of the foregoing Brief and Appendix for Appellant David Daniel Evans were mailed to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 6th day of April, 1977.

Richard S. Zorman